IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 133 of 2000

with

CRIMINAL APPEAL No 248 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ISMAIL ADAM MITHA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 133 of 2000
   MR HARIJINDAR SINGH for MR RAMNANDAN SINGH for for Appellant
   MR IM PANDYA, APP for Respondent
2. Criminal Appeal No. 248 of 2000
   MR IM PANDYA, APP for Appellant
   MR HARIJINDAR SINGH FOR MR RAMNANDAN SINGH for for Respondent Nos.1 and 2

CORAM : HON'BLE MR.JUSTICE R.P.DHOLAKIA

and

HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 19/08/2004

COMMON C.A.V. JUDGEMENT

(Per : HON'BLE MR.JUSTICE R.P.DHOLAKIA)

Criminal Appeal No.133 of 2000 under Sec.374 of the Code of Criminal Procedure ('the Code' for short) is directed against the judgment and order of conviction and sentence dated 4-2-2000 passed against the present appellant by the District and Sessions Judge, Bharuch, in Sessions Case No.145 of 1995 whereby the appellant Ismail Adam Mitha (Tailor) @ Deka, resident of Sitpon, Taluka and District Bharuch, has been convicted for the charge under Sec.21 read with Sec.22 of the Narcotic Drugs and Psychotropic Substances Act ('the Act' for Short) and sentenced to suffer 11 years R.I. with fine of Rs.2.00 lakhs in default to suffer two and half years more R.I.

2. Criminal Appeal No.248 of 2000 under Sec.378 (1)(3) of the Code preferred by the State of Gujarat is directed against the judgment and order of acquittal dated 4-2-2000 passed by the District and Sessions Judge, Bharuch, in Sessions Case No.145 of 1995 whereby the original accused No.2-Aminaben, wife of Ismail Adam Mitha (Tailor) @ Deka and the original accused No.5-Ibrahim Malangminya Shaikh were acquitted of the charges levelled against them. However, no appeal was preferred against the judgment and order of acquittal passed against the original accused Nos.3,4 and 6.

3. Initially, while admitting the appeals, this Court (Coram: M.S.Parikh & H.H.Mehta,JJ) vide order dated 21-2-2000 directed for expedite hearing of the appeals. Thereafter, this Court (Coram: D.K.Trivedi & M.S.Shah,JJ.) vide order dated 19-9-2003 passed in Cri.Misc.Appln.No.7143 of 2003 in Criminal Appeal No.133 of 2000 ordered for hearing of both these appeals together.

4. Both these appeals were listed before us in the middle of June, 2004. We have given priority to these appeals and started hearing learned counsels appearing for the respective parties. As common facts and law arise in both these appeals which had arisen out of a common judgment and order, we are deciding both these appeals together by way of a common judgment.

5. The case of the prosecution is that on 25-6-1995,

one Shri Abhesinh Devisinh Chudasma serving as a Deputy Superintendent of Police, Ankleshwar, District Bharuch, received a secret information at 4.00 a.m. that one Ismail Adam Mitha (Tailor) @ Deka, resident of Sitpon, Taluka and District Bharuch, was keeping narcotic substance like brown sugar in his occupation and possession at the bungalow situated at Sitpon and was engaged in the said illegal business of buying and selling as well as importing and exporting the said narcotic substance in the international market. He was also dealing in the illegal business of deadly weapons and ammunition. Said information was conveyed to Superintendent of Police, Bharuch, and thereafter he along with CPI, Ankleshwar, Shri K.R.Parmar, Reader PSI, Zala, N.D.Dodiya, Gurudeshwar PSI and other police personnel went to Nabipur Police Station at about 7.00 a.m. where PSI, Nabipur Police Station, was given to understand that a raid was to be carried out and he instructed to call panchas and weighing person. Necessary information was given to post the said entry in the Station Diary and it was entered in the Station Diary by Dy.S.P., Mr.Chudasma. Written intimation as regards this information was given to the District Superintendent of Police. On arrival of panchas and weighing person, when they were given to understand about this, they showed willingness to act such and hence, after preparing primary panchnama, raiding party consisting of Police personnel, panchas and weighing person proceeded towards Sitpon Village. Upon reaching there, they entered into Unda Faliya area where the house of Ismail Adam Mitha is situated. The said house had a big compound wall and by opening the gate, they entered into the compound. When they knocked at the door, a person opened the door from inside and on being asked stated his name to be Ismail Adam Mitha (Tailor) Deka. Dy.S.P., Mr.Chudasma and others informed him that as they received an information of his dealing in narcotic substance, deadly weapons and ammunitions, a search was to be carried out in the said house. He was asked about his valuable right of search. He stated of not having any objection if search is to be conducted in presence of police and panchas. When police personnel with panchas and weighing person conducted a search on said Ismail Adam Mitha, nothing incriminating was found. In the kitchen of the said house, one lady was seen and on being asked stated her name to be Aminaben, wife of Adam Ismail Mitha @ Deka. Thereafter, search was conducted on the ground floor portion of the said house. After completion of search on the ground floor, nothing incriminating was found. Thereafter, they went on the upper floor of the house through staircase and reached in one A/c room situated on the western side.

During the search in said room, they found one grey colour zip bag (thelo) hidden beneath the bed on the pillow portion having two pockets, one of which was having chain. On the upper side portion of the said bag, one plastic bag was found. In the said plastic bag, there was one cloth bag stitched on three sides by sewing machine whereon, in all, seven illegible rubber stamps in blue ink in some Arabic like and English language were affixed along the stitched portion and the middle. On the otherside of the said bag, there was some writing in green colour in Arabic like language which appeared to them to be of some powder like substance filled in it. Upon break opening the front side stitched portion of the said cloth bag, one plastic bag was found. On opening the same, one another paper bag duly packed containing powder substance filled in it was found. They could not ascertain the substance found therein on being smelt but they guessed that to be of some narcotic substance. Photographs of the said proceedings were taken. Hence, police personnel categorically asked the accused No.1 as to whether he did hold the licence, permit or authority to keep the said narcotic substance. He stated of not having the same. Thereafter, request was made to Yusufbhai Ahmedbhai Banglawala, who was present there as weighing person, to carry out the weight and it was found to be weighing 1 kg. and 10 gms. From the said packets, two samples each of 10 gms. of the above substance were taken and kept in separate boxes in presence of accused and raiding party and kept in a cotton cloth and stitched with the string. Slip signed by the Police officers and panchas was put on it and seal in the name of PSI, Nabipur Police Station in English was applied on both the samples. Similarly seals were applied on the cloth bag containing remaining substance weighing 990 gms of substance. Arrangements were made for sending the samples to FSL. The value of the substance caught was assessed to be Rs.1.00 crore in the international market. Search was conducted on the remaining portion of the first floor also. However, no incriminating articles were found. Thereafter, they went to the terrace wherein also, no incriminating articles were found. Upon conducting search in the garden also, nothing incriminating was found. Thereafter, muddamals were taken into custody for the purpose of investigation and second part of panchnma was completed on the spot. Signatures of panch witnesses and Police Officers i.e. Dy.S.P., Mr.Chudasma, CPI, Mr.Parmar of Ankleshwar and PSI, Mr.Barad of Nabipur Police Station were taken on each page. On behalf of the State, complaint was prepared and signed by Mr.Barad, PSI of Nabipur Police Station in which Dy.S.P., Ankleshwar also put his

signature as "before me". It was signed by CPI, Ankleshwar also. Yadi was prepared by Dy.S.P., Mr.Chudasma directing the concerned authority to hand over further investigation to CPI, Mr.Parmar. During the course of investigation, both these persons were arrested informing them about the same in writing and completing all required formalities. The offences punishable under Secs.8(c), 21, 22, 23 and 29 of the Act were registered against the accused Nos.1 and 2 i.e. Ismail Adam Mitha (Tailor) @ Deka and Aminaben, wife of Ismail Adam Mitha, as Nabipur Police Station C.R.No.II-73 of 1995 on 25-6-1995. Both these accused were produced before the concerned Court on 26-6-1995 where remand was sought for which was granted for 10 days.

5.1 During interrogation of both these accused on 27-6-1995, accused-Ismail Adam Mitha voluntarily offered himself to show other substances of similar nature kept by him. Therefore, panchas were called by Mr.Parmar through PSI, Nabipur Police Station, and they were given to understand to remain as panchas and were introduced to the accused. After completion of all other formalities regarding writing of primary panchnama, etc. Dy.S.P., Mr.Chudasma, I.O. Mr.Parmar, panchas and other members of the raiding party left Nabipur and went along the way shown by the accused and reached Unda Faliya Bungalow situated at Sitpon where all of them got down. Thereafter, Ismail Adam Mitha led the raiding party with panchas to backside portion of osri and pointed his finger towards the place on the ground. Said place was dug with the help of 'trikam' (an agricultural instrument used for digging) and spade. From the said place, one big gunny bag like urea fertilizer bag in white colour was found. On opening the said bag, 4 rexin bags containing filled with some powder like substance were found. Two of these four bags were applied with prime colour cello-tape. Thereafter, these bags were opened in presence of panchas and members of raiding party and brown colour powder having the smell of brown sugar was found. The same was weighed by Shri Usuf Ahmed Banglawala, person who weighed the muddamal in the first raid. First bag was found to be weighing 1 kg. and 50 gms., second bag 1 Kg. and 60 gms, third kakhi bag 990 gms and fourth kakhi plastic bag 970 gms. and cello-tape was also taken. From all these four bags, samples weighing 10 gms. from each bag by tearing one side of the bag were taken, prepared a separate plastic small bag for putting said samples and kept in galvanizing small tin and packed in plastic bags wrapped on paper and stitched in cloth. Slip duly signed by the panchas and police officers was affixed and seal in the name of PSI,

Nabipur Police Station in English was also affixed on those four samples. The packets containing remaining powder were stitched in the respective bags whereof slip duly signed by the panchas and police officers was affixed and seal of PSI, Nabipur Police Station, was applied separately and kachha receipt was issued to the accused as regards said muddamal and signatures of accused were obtained. Second part of the panchnama was drawn there on the spot in presence of panchas and members of raiding party which was duly signed by the panchas and police personnel. Photographs of the proceedings were also taken. Arrangements were made for sending the samples to FSL.

5.2 During further interrogation, since it was revealed that he had received the stock of brown sugar from Ibrahim Malek Shaikh of Yakubpura, Vadodara, said Ibrahim was arrested on 16-7-1995 and on 17-7-1995 during further interrogation of said Ibrahim, he voluntarily offered to show other stocks of brown sugar kept by him. Therefore, panchas, weighing person and photographers were called to Nabipur Police Station by PSI, Mr.Barad. Keeping all the sealing materials and instruments with them, the Investigating Officer, panchas, photographers and weighing person and another police personnel decided to proceed in the Govt. vehicle parked in the compound of Nabipur Police Station. The accused-Ibrahim sat near the driver's seat while other police personnel, panchas, weighing personnel and photographers were also seated. Prior to that, primary panchnama was drawn. Thereafter, they started from Nabipur and reached Lalji Masjid in Vadodara where vehicle was stopped as per the say of the accused. Upon getting down from the jeep, the accused, showing the board of Smart Tailors stated that the shop closed with lock is his shop. The accused gave key of said shop to police Constable, Nareshbhai, who had opened two big locks and the accused with other members of the raiding party went inside. The accused took one packet of grey colour from the drawer of the cutting table in which two rexin packets duly stitched were found which when weighed through weighing person were found to be weighing 1 kg. and 150 gms. each. The price of each packet is assessed to be Rs.1.00 crore in the international market. On tearing one corner of the packet, brown colour powder filled therein could be seen therefrom which the police personnel and panchas found to be the contraband article. Thereafter, two samples of 5 gms. each were taken from them which were packed in small plastic bags wrapped with paper and put in a cloth. The slip signed by panchas and police officers was attached to it and tied with string wherein seal of PSI,

Nabipur Police Station, in English was put on it and taken the muddamal into custody. Remaining powder was weighed and each packet was found to be weighing 1 kg. and 140 gms. As aforesaid, slip duly signed by the panchas and police officers was applied on front side and back side. All formalities of sealing were completed and taken them in custody. Photographs of the proceedings were also taken. Both the sample packets put in galvanizing small tins were packed in the plastic bag on which paper was wrapped and put in cloth. Arrangements were made for sending the samples to FSL and keeping rest of the muddamal in proper custody after obtaining permission from the Court.

5.3 During the course of investigation, names of accused Nos.3,4 and 6 were also revealed and they were accordingly arrested, interrogated and sent to judicial custody. After completion of investigation, the present appellant and other accused were charge-sheeted. Thereafter, learned District and Sessions Judge, Bharuch framed charges against the accused. The accused Nos.1 and 2 were charged under Secs.8(c), 21, 22, 23 and 29 of the Act. The accused No.2 was also charged alternatively under Sec.25 of the Act. The accused Nos.3, 4 and 6 were charged under Secs.8(c), 21,22,23 and 29 of the Act while accused No.5 was charged under Secs.8(c), 21, 22, 23 and 29 of the Act. Charges were read over and explained to the accused. They pleaded not guilty to the same and claimed to be tried.

5.4 The prosecution examined, in all, 26 witnesses namely, Yusufbhai Ahmedbhai Banglawala, the person who weighed muddamals in all the three raids, as P.W.No.1 at Ex.37; Gulambhai Ibrahimbhai, servant of accused No.1 as P.W.No.2 at Ex.43; Mahmad Umarji Patel, relative of accused Nos.1 and 2 as P.W.No.3 at Ex.44; Amratlal Chunilal Soni, goldsmith as P.W.No.4 at Ex.45; Dineshbhai Ramanbhai Sodagar, photographer of the first search and seizure dated 25-6-1995 as P.W.No.5 at Ex.46; Rahulbhai Ramanbhai Sodagar, photographer of the 3rd search and seizure carried out on 17-7-1995 at Vadodara at the instance of accused No.5 as P.W.No.6 at Ex.47; Ahmedbhai Valibhai, neighbour of accused Nos.1 and 2 as P.W.No.7 at Ex.48; Chhitubhai Mahendrabhai Vanza, relative of accused-Pankajbhai and as per the say of prosecution he went to the house of accused No.1 on 19-6-1995 along with Pankajbhai Chandubhai Dorawala as P.W.No.8 at Ex.49; Mariyaben Homnik, receptionist of Hotel King, Bombay, as P.W.No.9 at Ex.51; Ismailbhai Ibrahimbhai Pathan, owner of Hotel City Palace, Vadodara, as P.W.No.10 at Ex.53; Abdulbhai Mohanbhai, Manager of Hotel City Palace,

Baroda, as P.W.No.11 at Ex.55; Kantibhai Kevarbhai, panch of panchnama Ex.65 regarding search and seizure of house of accused Nos.1 and 2 dated 25-6-1995 as P.W.No.12 at Ex.61; Yakub Valibhai Patel, Head Constable of Nabipur Police Station who went to FSL, Ahmedabad, for handing over the muddamal, as P.W.No.13 at Ex.66; Shanabhai Abhesinh, panch of panchnama of 2nd search and seizure taken place in the house of accused Nos.1 and 2 at Sitpon on 27-6-1995 as P.W.No.14 at Ex.70; Ashokbhai Lallubhai Patel, panch of 3rd search and seizure dated 17-7-1995 carried out at the instance of accused No.5 at his shop Smart Tailor at Vadodara as P.W.No.15 at Ex.86; Chaturbhai Jesangbhai, panch of panchnama of 3rd search and seizure of preliminary analysis by the FSL officer at Nabipur Police Station as P.W.No.16 at Ex.94; Fatesinh Gumanbhai, 2nd panch of above referred panchnama dated 18-7-1995 for preliminary analysis of the muddamal seized in 3rd raid from Vadodara as P.W.No.17 at Ex.98; Shivabhai Dhanjibhai, Head Constable of Nabipur Police Station, who took muddamal to FSL, Ahmedabad, as P.W.No.18 at Ex.100; Mahipatsinh Nathubawa, Head Constable, Nabipur Police Station, who took muddamal to FSL, Ahmedabad, on 27-6-1995 and through him, prosecution has proved receipt Ex.107 issued by FSL, Ahmedabad, dated 27-6-1995 as P.W.No.19 at Ex.106; Nareshkumar Jorabhai, Writer Head Constable of CPI, Ankleshwar, member of the raiding party and search and seizure process of 3rd raid at Vadodara on 17-7-1995 as P.W.No.20 at Ex.110; Rajendra Amrutlal, Head Constable, Nabipur Police Station, who handed over the muddamal to FSL on 29-6-1995 as P.W.No.21 at Ex.118; Udesinh Barad, who at the relevant time was working as PSI, Nabipur Police Station, as P.W.No.22 at Ex.121; Daudbhai Rehmanbhai, Manager of shop No.A-5 situated in Lalji Kui as P.W.No.23 at Ex.125; Abhesinh Devisinh Chudasma, Dy.S.P., Ankleshwar Division, District Bharuch, who has received secret information and who led the raiding party to Sitpon, Taluka and District Bharuch at the residence of accused Nos.1 and 2 as P.W.No.24 at Ex.169; K.G.Sadhwani, S.D.O. Telephone Department through whom prosecution tried to prove the receipt of information over telephone No.272 installed at the house of accused No.1 at Unda Faliya as P.W.No.25 at Ex.175 and K.R.Parmar who was CPI, Ankleshwar Division at the relevant time and member of raiding party in all the three raids and who was the I.O. of Nabipur Police Station C.R.No.II-73 of 1995 as P.W.No.26 at Ex.188. Thereafter, the prosecution submitted the closing pursis.

5.5 The defence examined Mr.Bakulbhai Jivabhai Patel, Bharuch reporter of a Gujarati vernacular daily "Gujarat Samachar", as D.W.No.1 at Ex.251.

5.6 The prosecution submitted a list of documents, the important ones being the information received by Dy.S.P., Mr.Chudasma reduced in writing Ex.189; Station Diary entry dated 25-6-1995 Ex.122/189; confidential letter dated 25-6-1995 written by Dy.S.P., Mr.Chudasma to D.S.P., Bharuch Ex.170; panchnama of search and seizure dated 25-6-1995 Ex.65; the complaint filed by PSI, Barad of Nabipur Police Station on behalf of State Ex.304; Yadi by Dy.S.P. addressed to Officer-in-charge of Nabipur Police Station handing over investigation to CPI, Mr.Parmar Ex.171; panchnama of second raid carried out at Sitpon Village in the house of accused No.1 on 27-6-1995 Ex.71; receipt issued by Weighingman, Mr.Yusuf Banglawala for all the three raids dated 25-6-1995, 27-6-1995 and 17-7-1995 Exs.38, 39 and 40 respectively; FSL receipts Exs.67, 101, 107; panchnama of third raid dated 17-7-1995 at Vadodara in the tailoring shop of accused No.5 at Ex.87; FSL report for primary analysis of muddamal seized vide panchnama Ex.87 at Ex.95; FSL reports Exs.309 to 313; Hotel King's entry in the register Ex.52; Hotel King's bill Ex.224; Hotel City Palace entry Ex.54; arrest memo of accused Nos.1 and 2 dated 25-6-1995 Ex.123; register regarding entry No.67 of Telephone Department of Nabipur area Ex.176; Telephone Advice Note Book Entry No.17402 at Ex.177; Original Advice Book Ex.181; arrest memo of accused Nos.3 and 4 Ex.210 dated 28-6-1995 and newspaper photographs taken by D.W.No.1 at Exs.254 and 256. Apart from other documents, prosecution also produced report as to keeping muddamal in Police Station dated 27-8-1995 at Ex.109 and also forwarding letter to FSL dated 25-6-1995 at Ex.108.

5.7 After recording the evidence of prosecution witnesses was over, learned Judge explained to the appellant and other accused the circumstances appearing against them in the evidence of prosecution. Further statements as required under Sec.313 of the Code was recorded. In the further statement of the appellant-Ismail Adam Mitha, he totally denied the case against him and stated that police had filed false case against him. Apart from that, he submitted his written statement as contemplated by Sec.233(2) of the Code and claimed that he was falsely implicated in the case. To support his case, he got examined D.W.No.1, Bakulbhai Jivabhai Patel, Bharuch reporter of a Gujarati vernacular daily "Gujarat Samachar", as D.W.No.1 at Ex.251 and prayed for acquittal and also relied upon ration card issued by the Civil Supplies Authority. Similarly, other accused also denied the case of the prosecution and submitted their written statement as contemplated under

Sec.233(2) of the Code and claimed them to be innocent and falsely involved and hence, prayed for acquittal. They chose neither to examine any witness to support their say nor stepped into the witness box for deposing on oath.

5.8 After giving opportunity to the learned advocates appearing for the respective parties and on appreciation of evidence adduced by the prosecution, learned Trial Judge came to the conclusion that the prosecution did establish its case against the accused No.1 for the offence under Sec.21 read with Sec.22 of the Act beyond reasonable doubt. The Trial Judge, however, acquitted the accused Nos.2 to 6 for the charges levelled against them. The learned Judge, after hearing the accused No.1 on the point of sentence, ordered him to undergo sentence of 11 years R.I. and fine of Rs.2,00,000/-, in default, to suffer two and half years more which is giving rise to file Criminal Appeal No.133 of 2000 for the original accused No.1 against his conviction and Criminal Appeal No.248 of 2000 for the State against the acquittal of original accused No.2-Aminaben, wife of Ismail Adam Mitha, and original accused No.5-Ibrahim Malangminya Shaikh. For rest of the accused i.e. original accused Nos.3,4 and 6, who have been acquitted by the court below, no appeal has been preferred by the State.

6. We have heard Mr.Harijindar Singh for Mr.Ramnandan Singh, learned counsel for the appellant in Criminal Appeal NO.133 of 2000 as well as for the respondent Nos.1 and 2-original accused Nos.2 and 5 in Criminal Appeal No.248 of 2000 and Mr.I.M.Pandya, learned APP for the respondent-State in Criminal Appeal No.133 of 2000 as well as for the appellant in Criminal Appeal No.248 of 2000. The appellant of Criminal Appeal No.133 of 2000 and respondents of Criminal Appeal No.248 of 2000 produced their written submissions which are ordered to be taken on record. We have also heard the arguments advanced at the bar by the learned counsel for the respective parties and also the written submissions and reappreciated the whole evidence on record shown to us by the learned counsel for the respective parties. Learned counsel for the respective parties also placed reliance upon various reported judgments as reflected in their written submissions which would be considered as and when necessary.

7. It was the first contention raised by the learned counsel for the appellant, Mr.Harijindar Singh, that the alleged contraband article seized on 25-6-1995 was neither under control nor in custody of the appellant.

According to him, the prosecution case is that an information was received at 4.00 a.m. on 25-6-1995 by Shri Abhesinh D.Chudasma which was forwarded to Superintendent of Police, Bharuch and thereafter raiding party went to Village Sitpon and carried out search in the premises of the appellant who was found in the premises along with his wife i.e. Aminaben-original accused No.2 and panchnama Ex.65 of 25-6-1995 was drawn in presence of witnesses i.e. P.W.No.12-Kantibhai Kevalbhai and P.W.No.26-Kiritbhai R. Parmar. However, the case of the appellant according to learned counsel for the appellant is that information which was received by Mr.Chudasma, P.W.No.24, was of a fabricated document as would appear from the cross-examination of the defense witness produced by the appellant as D.W.No.1-Bakulbhai Jivabhai Patel at Ex.251.

7.1. To substantiate the aforesaid contention, Mr.Harijindar Singh took us through the panchnama Ex.65 of 25-6-1995 along with the oral evidence of P.W.No.12, Mr.Kantibhai Kevalbhai Patel at Ex.61, who is one of the panchas of panchnama Ex.65 of search and seizure dated 25-6-1995 more particularly the cross-examination thereof. He also took us through the oral evidence of Mr.Kiritbhai Ramjibhai Parmar, P.W.No.26 at Ex.188, who, at the relevant was CPI, Ankleshwar Division, and one of the members of raiding party and also the evidence of D.W.No.1, Mr.Bakulbhai Jivabhai Patel, Ex.251, who was Bharuch reporter of Gujarat Samachar, a Gujarati vernacular daily, through him the appellant tried to prove that the report published in Gujarat Samachar on 26-6-1995 was prepared and sent by him and the photographs published with the report were taken by him and his son. It was deposed by Mr.Patel in his examination-in-chief that news item was received by him on 25-6-1995 and photographs were taken on 25th noon itself. In his cross-examination, he admitted that he had written the name and address of accused No.1 with his telephone number 272 upon the small box in which negatives were kept. Relying upon the evidence of aforementioned witnesses, it was contended that in view of the newspaper report published in Gujarat Samachar on 26-6-1995, raid was conducted on 23-6-1995 and, therefore, the relevant document i.e. Ex.65 and the information reduced in writing by Mr.Chudasma and forwarded to his Superior Officer are false and fabricated. It was further contended that when raid was conducted on 23rd June, 1995, the deposition of Mr.Chudasma and evidence on record to the effect that the information received by Mr.Chudasma was reduced in writing, informed to his Superior Officer, entry in

Station Diary was posted by him and drawn panchnama Ex.65 are false. Once it is established that the raid was carried on 23rd June and the muddamal of panchnama Ex.65 was searched on 23rd June, 1995, then, according to him, there is a violation of Sec.42 of the Act.

7.2. In this connection, reliance was placed upon the case of State of Punjab Vs. Balbir Singh, (1994)3 S.C.C. page 299 more particularly towards page 302. It was contended that Sec.42(1) of the Act is mandatory as decided by the Apex Court. Placing reliance upon the cases of Saiyed Mohammed Saiyed Vs. State of Gujarat, JT 1995(3) S.C. page 489; H.P. Vs. Priti Chand and Others, 1995 Vol.9 S.C. page 411; State of Punjab Vs. Labhsingh, JT 1996 Vol.6 S.C. page 598; State of Punjab Vs. Baldev Singh, (1999)6 S.C.C. page 172=JT 1999(4) S.C. page 595; Bekodam Abdul Rahim Vs. State of Kerala, JT 2002 S.C. page 68 and Abdul Rahim Ibrahim Mansuri Vs. State of Gujarat, (2000)2 S.C.C. page 513, it was contended that the provisions of Sec.42(1) of the Act are mandatory and failure to comply with same would vitiate the conviction and not the trial. It was further contended that the finding of the trial court is wrong. It was further contended that the report made by Mr.Chudasma being false would tantamount to violation of Sec.42 of the Act and therefore order of conviction stands vitiated.

8. Whereas Mr.I.M.Pandya, learned A.P.P., drawing our attention towards the evidence of Dy.S.P., Mr.Chudasma, I.O., Mr.Parmar and other witnesses, contended that nowhere it is the case of the prosecution that any search was conducted on 23-6-1995 and if the entire evidence is gone through, it can be said with certainty that the search and seizure were made on 25-6-1995 at the bungalow of accused No.1 after following all procedures as required under the Act and hence, there is no violation of Sec.42.

9. There cannot be any dispute regarding the law laid down by the Apex Court in the aforesaid judgments relied upon by learned counsel for the appellant. Keeping in mind the principles laid down in those judgments, we have minutely evaluated the evidence relied upon by the learned counsel for the appellant of two panchas, Mr.Chudasma, CPI, Mr.Parmar and D.W.No.1-Bakulbhai Jivabhai Patel together with documentary evidence. Learned counsel for the appellant mainly relied upon the evidence of D.W.No.1-Bakulbhai Jivabhai Patel, the reporter of Gujarat Samachar. It was categorically deposed by him in his examination-in-chief

that he had received information regarding search and seizure of muddamal on 25-6-1995 and photographs were taken by him as well as his son on 25th afternoon. It is clear from his examination-in-chief that information was received by him on 25-6-1995 and nowhere it was deposed by him that he received information of the raid having conducted on 23-6-1995. Hence, it cannot be said that the raid was conducted on 23-6-1995 in view of volumnious evidence on record to prove that the officer concerned i.e. P.W.No.24 had received information on 25-6-1995 at 4.00 a.m. through the informant which was informed to his Superior Officer and, thereafter, panchas and weighing person and other Police Officers were called who were appraised of the information, drawn primary panchnama at Nabipur Police Station and went to Sitpon Village in a Government vehicle and reached the house of the appellant at about 8.00 a.m. where raid was conducted. It can thus be seen that all the required provisions of Sec.42 were followed by the prosecution. In view of the fact that the raid was conducted on 25-6-1995 after following all procedures as required under Sec.42 and not on 23-6-1995, we are unable to accept the contention raised by Mr.Harijindar Singh that there is any breach of Sec.42 of the Act.

10. The second contention raised by the learned counsel for the appellant was that whether accused No.1 had conscious possession of the alleged article seized from the house at Sitpon where the accused was found to be present along with Amina, accused No.2. It is admitted case of the prosecution that the accused was not found in that room. No objectionable items were recovered from ground floor and accused No.2 Amina was in the kitchen. Nothing was recovered. Raiding parties went to the upper storey and it is the case of the prosecution that in the bed room while searching mattresses of the bed, a cloth bag was found underneath the pillow which was seized and panchnama was drawn on 25-6-1995.

10.1 If the search was started on 23-6-1995 as is apparent from the cogent evidence produced by the accused i.e. statement of D.W.No.1, the said panchnama which is being drawn on 25-6-1995 by P.W.No.24, Shri Abhesinh and witness P.W.No.12 who had signed the said panchnama is also a fabricated document. The fact had been suppressed from the trial court that the raid was conducted from 23-6-1995. It is a settled legal position that supresso veri uno falsi i.e. where there is suppression of fact, it tantamounts to stating to be false. Therefore, the panchnama which is being relied upon is a false and

fabricated document and no reliance on the same can be placed as per even the finding of the trial court, because, search started from 23-6-1995 whereas the P.W.No.24 Abhesinh states that it started from 8.00 a.m. to 11.00 a.m. on 25-6-1995. There is no material to show that accused Nos.1 and 2 had any knowledge about the alleged contraband having seized by the police. Even no question u/s 313 of the Code has been put to the accused with regard to conscious possession of the alleged contraband. Mere presence in a house, when the contraband is seized which is concealed under the pillow cannot be said that the accused No.1 or accused No.2 had any knowledge about the alleged contraband. Therefore, there being no conscious possession of the alleged contraband, the charge u/s 21 read with section 22 of the Act fails and the appellant is entitled to acquittal. In this respect, considering the Full Bench judgment reported in JT 1994 (5) S.C. page 540 in the case of Sanjay Dutt Vs. State, which was a case under TADA, the Honourable Supreme Court while dealing with the question of possession held that in the context the word "possession" must mean possession with requisite mental element i.e. conscious possession and not mere custody without awareness of the nature of such possession. There is mental element in the concept of possession. In the said judgment, it was also held that presumption can only be drawn if the ingredients of the offence are established. The same view has been taken in State of Punjab Vs. Baldev Singh of the Constitution Bench judgment under the Act and Sanjay Dutt judgment has been relied upon. Similarly, in JT 2001 S.C. page 471, Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat at page 479 para 21, the Honourable Supreme Court has held that if the Court on an appraisal of the entire evidence does not entertain doubt of a reasonable degree that he had real knowledge of the nature of substance concealed in the gunny bag, then the appellant is not entitled to acquittal. However, if the Court entertains a strong doubt regarding accused's awareness about the nature of substance in the gunny bag, it would be a miscarriage of criminal justice to convict him of the offence keeping such strong doubt undispelled and further held that presumption can be rebutted by circumstances appearing in prosecution case or in the prosecution evidence are such as to give reasonable assurance to the Court that the appellant could not have had knowledge or required intention burden cast on him u/s 35 of the Act would stand discharged. Similarly in Avtarsingh Vs. State of Punjab, (2002)7 S.C.C. page 419 and also in Aslam Parvez Vs. Government of NCCT Delhi, 2003(4) SCALE page 44 had taken the same view. Thus, there being no conscious

possession, panchnama being fabricated, conviction u/ss. 21 and 22 of the Act is not sustainable.

11. Mr.I.M.Pandya, learned APP, on the other hand, vehemently contended that there are ample evidence on record to show that the accused No.1 was in possession and occupation of the bungalow in question. In this regard, he took us through the relevant part of the impugned judgment and contended that what is required to be kept in mind is the possession and occupation and since the accused No.1 was in possession and occupation of the bungalow, it cannot be said that he was unaware of the contraband article being stored in his bungalow.

12. The fact before the Apex Court in JT 2001 S.C. page 471 which is equivalent to (2000)2 S.C.C. page 513, Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat relied upon by the learned counsel for the appellant was that the appellant was trying to transport charas to a particular place in a specified vehicle. Investigation revealed that the contraband was lodged in the said vehicle and when it was intercepted and searched by the Police Inspector, gunny bags containing charas were recovered from the said vehicle. The driver of the vehicle, while admitting that two persons had loaded the bags into his vehicle and directed him to transport the same to the specified destination, pleaded his unawareness of the contents of the bags. The prosecution did not adduce any evidence to show the existence of any criminal conspiracy between the driver and the main culprits to transport the contraband. Nothing was even there to suggest that the driver and the main culprits were close or even known to each other. Moreover, the police failed to nab the main culprits. In such circumstances, it was held by the Apex Court that the accused driver had successfully rebutted the presumption under Sec.35.

It was further held at head note 'B' as under:

"B.Narcotic drugs and Psychotropic Substances Act, 1985--S.35(1)&(2)--Defence plea of absence of culpable mental state--Standard of proof for, held, is proof beyond reasonable doubt."

12.1. In another judgment Avtarsingh Vs. State of Punjab, (2002)7 S.C.C. page 419 relied upon by him, the appellants were travelling in a truck which was carrying 16 bags of poppy husk. The appellant No.3 was driving the truck whereas appellant Nos.1 and 2 were sitting on the bags of poppy husk placed in that truck. The

investigation was not directed to ascertain the role played by each of the accused and the nexus between the accused and the offending goods. The question of appellants under Sec.313, Cr.P.C. was not asked about the possession of poppy husk. It was held that the appellants were not the only occupants of the truck. Two of the persons sitting in the truck made themselves scarce after seeing the police and the prosecution failed to establish their identity and hence it was held that it was quite probable that one of the said two persons could be the custodian of the goods in question. It was further held that persons who were merely sitting on the bags could not be presumed to be in possession of goods in the absence of proof of anything more. Hence, on facts, it was held that it was not safe to conclude that the appellants were in possession of poppy husk.

It was further held at head note 'F' as under:

"F. Narcotic drugs and Psychotropic Substances Act, 1985--Ss.15 to 23--Where the labourers are engaged merely for loading and unloading of the offensive goods and there is nothing to show that the goods were at least in their temporary custody, their conviction under the said sections may not be warranted--At best, they may be held to be the abettors."

12.2. Another judgment relied upon by Mr.Harijindar Singh of the case of Aslam Parvez Vs. Government of NCCT Delhi, 2003(4) SCALE page 44 was under the TADA Act wherein also, same view was taken by the Apex Court.

12.3. In the judgment delivered by this Court in Munnalal Mathura Prasad and Another Vs. State of Gujarat, reported in 37(1) G.L.R. page 162, it was held at head note as under:

"CRIMINAL TRIAL--Narcotic Drugs and Psychotropic Substances Act, 1985(LXI of 1985)--Sec.20--Evidence Act, 1872(1 of 1872)--Secs. 101 & 102--Accused charged with possession of contraband article--Prosecution to prove that accused was concerned with the contraband article or dealt with it in any manner--There must be "Conscious" possession of the contraband article--"Charas" recovered from premises raided and accused arrested from the premises--No evidence to show that premises belonged to the accused or that he was in exclusive occupation of the premises--Evidence of

defence to the effect that accused resided at some other place-Accused acquitted--Observation by Court that if prosecution proves physical custody then burden of proving that accused was not knowingly in possession of the contraband article would be upon the accused."

12.4. In another judgment delivered by this Court in Dashrathbhai Govindbhai Shah and Another Vs. State of Gujarat, 1998(3) G.C.D. page 2132(Guj.), it held at head note (b) as under:

" (b) Narcotic Drugs and Psychotropic Substances Act, 1985--Secs.54 and 17--Presumption of possession--Accused found in possession of opium--Ownership is not material but possession is an offence--No satisfactory account given for possession--Held, accused are guilty of offence punishable under Sec.17".

12.5. Keeping in mind the law laid down by the Apex Court in the judgments relied upon by the learned counsel for the appellant and also the law laid down by this Court in aforesaid judgments, we have evaluated the evidence on record. It was established that Dy.S.P., Mr.Chudasma, upon receipt of information at 4.00 a.m. on 25-6-1995 that narcotic drugs and arms and ammunition were stored in the house of one Ismail Adam Mitha of Sitpon Village, discussed this matter with Superintendent of Police, Bharuch, and posted the said information in the Station Diary and he along with other police personnel reached Nabipur Police Station. From there, they sent information to call panchas and weighing person. After preparing primary panchnama, they went in a Govt. vehicle and reached Sitpon Village at 8.00 a.m. on 25-6-1995 where accused No.1-Ismail Adam Mitha was present with his wife, who is accused No.2-Aminaben. Thereafter, Mr.Chudasma appraised the accused No.1 of his valuable rights of search. He did not object of his search in presence of police and panchas. Then search of ground floor of the house was carried out in presence of accused, panchas, weighing person and police personnel, but nothing incriminating was found there. The raiding party thereafter went to upper storey of the said house and while searching in the bed room, a bag was found hidden beneath the bed on the pillow side which was containing contraband article brown sugar and it was found to be weighing 1 kg. and 10 gms.

12.6. It was categorically deposed by Mr.Abhesinh Devisinh Chudasma, Dy.S.P., Bharuch, who was examined as

P.W.No.24 at Ex.169 in his oral evidence in para 2 that upon receipt of aforesaid information, he had telephonically talked with the Superintendent of Police, Bharuch and thereafter, he along with CPI, Ankleshwar, Shri K.R.Parmar, Reader PSI, Zala, N.D.Dodiya, Gurudeshwar PSI and other police personnel went to Nabipur Police Station at about 7.00 a.m. Thereafter, PSI, Nabipur Police Station, was given to understand that they have to go for a raid with police staff and hence, instructed to call panchas and weighing person. When they came, they were also given to understand about the raid and said information was posted in the Station Diary by him which is Ex.189 dated 25-6-1995. It was categorically mentioned that he had received the information from the informant on condition of anonymity that one Ismail Adam Mitha Tailor @ Deka, resident of Sitpon, Taluka and District Bharuch was keeping narcotic drug like brown sugar in his occupation and possession, transacting the same, engaged in the business of selling and purchasing the same in the international market illegally and that he was doing the illegal business of deadly weapons and ammunition. It was further deposed that written intimation as regards this information was given to the District Superintendent of Police, copy of which Ex.170 has been proved by him. It was further deposed that after preparing primary panchnama at Nabipur Police Station, raiding party consisting of Police personnel, panchas and weighing person proceeded towards Sitpon Village in the Government vehicle and entered into Unda Faliya area where the house of Ismail Adam Mitha is situated. The said house had a big compound wall and they entered into the compound through main gate of the house. Upon knocking at the door, a person opened the door from inside and on being asked stated his name to be Ismail Adam Mitha (Tailor) Deka. It was informed by him that as there was an information of his dealing in narcotic substance, deadly weapons and ammunitions, a search was to be carried out in the said house and, hence, whether he was wanting the said search to be carried out in presence of an Executive Magistrate or police. He had stated that he had no objection if search is conducted in presence of police and panchas. Thereafter, the police personnel with panchas and weighing person conducted a search on said Ismail Adam Mitha, but nothing incriminating was found. In the kitchen of the said house, one lady was seen and on being asked stated her name to be Aminaben, wife of Adam Ismail Mitha @ Deka. After completion of search on the ground floor, they went on the upper floor of the said house through the staircase where there were three rooms and while searching in one bed room, a bag was found hidden

beneath the bed on the pillow side. Upon lifting the bed, one grey colour bag with chain was found. Upon opening the said bag in the presence of panchas, one plastic bag was found. On checking the said bag, one cloth bag was found. The said bag was stitched from three sides with sewing machine and on the stitching part, the rubber stamp in blue ink in illegible Arabic and English languages were seen. It was further deposed that on the backside portion of the said bag, there was something written in green colour in Arabic like language and opening the same, it was found to be some powder like substance filled in one plastic bag. They guessed that substance to be of some narcotic substance i.e. brown sugar. Said muddamal was weighed and it was found to be weighing 1 kg. and 10 gms. From the said packets, two samples each of 10 gms. of the above substance were taken and kept in separate plastic bags in presence of accused and raiding party and the samples and control samples were backed in a plastic bag and then paper was wrapped around it and stitched with cloth. Slips signed by panchas and police officers were affixed on them and seal in the name of "PSI, Nabipur" was also affixed on said samples. The bag containing 1 kg and 10 gms powder presently with the plastic bag was stitched with cloth and string and wax and taken in custody for investigation. The slips duly signed by them and panchas were attached and seal was applied. Photographs of the proceedings were also taken. In the meantime, police personnel categorically asked as to whether he did hold the licence, permit or authority to keep the said narcotic substance. He stated of not having the same. Thereafter, search of the surrounding ground was conducted but nothing was found out. Panchnama of said place was drawn between 8.00 a.m. and 11.15 a.m. It was further deposed that he was shown Ex.65 which he stated to be the panchnama drawn in that regard and on each page of said panchnama, he had signed as "before me". It was further deposed that preliminary panchnama was prepared at the Nabipur Police Station and drawn rest of the panchnama there itself. Thereafter, complaint was prepared by Mr.Barad, PSI of Nabipur Police Station, in which he put his signature as "before me". Thereafter, yadi Ex.171 was issued for entrusting further investigation of the case to Mr.K.R.Parmar, CPI, Ankleshwar. Mr.Chudasma was minutely cross-examined by the advocate appearing for the appellant-accused. However, nothing adverse had come out.

12.7. It was proved by the prosecution that the concerned person who received information i.e. P.W.No.24, Dy.S.P., Mr.Chudasma, was the authorized

person to conduct the search and seizure. Before conducting search, he had discussed the matter with his Superior Officer and thereafter, he along with other police personnel and panchas went to Nabipur Police Station. It was also proved that before proceeding further, he had posted the information received in the Station Diary Ex.122 and he reduced the said information in his own hand writing which is Ex.189. Ultimately the said information turned out to be true as muddamal brown sugar weighing 1 Kg. and 10 gms was recovered from the accused No.1 in presence of police personnel and panchas. In short, prosecution was able to prove that information which was reduced in writing turned out to be true.

12.8. Further, we have also minutely evaluated the evidence of PSI, Nabipur Police Station, Mr.Barad, who was examined as P.W.No.12 at Ex.129. It is through him the bungalow of search and seizure was proved by the prosecution. He supported the say of the prosecution in toto.

12.9. Another witness of the prosecution, Gulambhai Ibrahimbhai, who was examined at Ex.43 and who is serving with the accused Nos.1 and 2 had categorically deposed that the accused No.1 is the owner of the house in question. It was further deposed by him in para 4 that as and when Ismailbhai used to leave for England, he used to take key of the house with him. Though he was declared hostile, it was admitted by him in his cross-examination that he is the permanent resident of Sitpon Village. He also admitted that though he was serving with Ismailbhai, he was not being paid monthly salary but financially being assisted by Ismailbhai. He also admitted that the house in which the raid was conducted is of Ismailbhai and the entire management and possession thereof is with him. The appellant's own witness, D.W.No.1, Mr.Bakulbhai Jivabhai Patel, deposed that accused No.1 had informed him that he is the owner of the house and used to stay there with his wife.

12.10. Mr.K.G.Sadhwani who has been examined by the prosecution at Ex.175 is an Officer from the Department of Telecommunications. In para 2 of his examination-in-chief, it was deposed on going through the record brought by him pertaining to telephone number 272 of Sitpon Village that the record pertaining to the proceedings initiated prior to issuance of waiting list number of phone number 272 is not available. However, Waiting List Registers were being maintained exchange-wise and not yearwise. It was further deposed that said waiting list commences from 21-11-1995 and name

of Haji Ismail Adam Tailor was registered at Sr.No.67 showing the address "At and Post Sitpon". He was issued demand note No.37 dated 5-9-1988 and advance deposit of Rs.100/- was paid by him. The order for telephone number was issued vide order No.17402 dated 28-11-1991 and telephone number 272 was given on 23-11-1991. Entry No.67 was proved by him at Ex.176 and original advise note in respect of telephone number 272 was proved at Ex.177. The name of the customer against telephone number 272 appearing in the Customer Entry Card-Subscriber Record is that of Haji Ismail Adam Tailor and the address "At & Post Sitpon". Para 8 of his deposition shows that date of issuance of first bill for telephone number 272 was 11-2-1992 and that of last bill was 1-10-1996. In his cross-examination, it was categorically admitted that in the year 1991 he was not at SDOT, Jambusar, Bharuch Division.

12.11. Along with the evidence of aforesaid witnesses, the evidence of D.W.No.1, Bakulbhai Jivabhai Patel, Bharuch reporter of Gujarat Samachar daily, who has been examined at Ex.251 has to be seen. According to him, he visited the premises in question on 25-6-1995. He wrote the name and address of the accused No.1 with telephone number on the box in which the negatives were kept.

12.12. In view of the aforesaid, it is clear that the information received was qua accused No.1 which turned out to be true when the accused No.1 was found in the premises in question from where the muddamal in question were seized from the bed room of the first floor in such a place where except the accused no.1 none else can have the knowledge being inaccessible to others. It is in the evidence of the servant of accused No.1 that in that premises, only the accused No.1 and his wife were staying and accused No.1 is having the actual and physical possession and is in occupation and control over the said house. It was categorically deposed by him that as and when the accused No.1 used to leave for England, he used to take key of the bungalow with him. In these circumstances, the trial court rightly held that the accused No.2 was not having control over the premises in question though staying there with the accused No.1. In view of the aforesaid and in view of the fact that in all, about 5 kgs. of brown sugar valuing Rs.5.00 crores in the international market were seized from the compound of his premises, theory of planting would also be improbable. It was established from the evidence which we have discussed above that though the bungalow is not in his name, he was occupier in the said bungalow and for getting presumption under Secs.35 and 54 of the Act, the

ownership is not material. What is material is the possession, occupation and control over the property, then the knowledge regarding contraband article. Both these are established by the prosecution against the accused No.1 beyond reasonable doubt and, therefore, keeping in mind the evidence on record and also the judgments relied upon by the learned counsel for the accused No.1, we are of the opinion that the accused No.1 was in possession, occupation and control over the bungalow in question and had a knowledge regarding the muddamal in question hidden in his bungalow and is a conscious possession. In these circumstances, prosecution is entitled to the benefit of Secs.35 and 54 of the Act. Now the burden of rebuttal is on the accused No.1. However, he failed to do so. Even ration card would not help the accused No.1 to content that he was not staying in the bungalow in question being a British citizen in view of the fact that British citizen is not entitled for ration card. We, therefore, agree with the finding arrived at by the trial court that the accused No.1-Ismail Adam Mitha had a knowledge of the contraband article having kept in his bungalow and failed to discharge the burden of rebuttal.

13. The third point raised by the learned counsel for the appellant was that FSL reports exhibited as Exs.309 and 310 under Sec.293(2) of the Code are not the representative samples of the muddamal searched and seized from the accused No.1 and if the reports are read as a whole, it has not been proved that they were either narcotic substance or psychotropic substance.

13.1 In this connection, he relied upon the judgment reported in the case of Mahmad Hanif Shaikh Ibrahim Vs. State of Gujarat, 1994(2) G.L.R. page 1191. Taking us through the 7th Edition of Criminalistics - An Introduction to Forensic Science by Richard Saferstein, it was contended that the best test to find out as to whether the muddamal is a psychotropic substance or narcotic drug is the screening test. According to him, screening test has not been conducted in this case and, therefore, prosecution has failed to prove that said substance is a contraband article. It was also contended that there is no quantitative test taken nor any data given in FSL reports and hence, no reliance can be placed on the said reports. In this connection, he took us through para 16 of the impugned judgment and contended that conclusion arrived at by the trial court is contrary to law since there is no quantitative test performed in said test and also since the ban of dicetiyl morphin in excess of 0.02% or morphine in excess of 0.02%

covers the Act. Hence, according to him, FSL report can be of no assistance to determine whether the said contraband item falls under the Act or not. In absence of any quantitative test having done, court below ought to have come to the conclusion that the muddamal alleged to have been seized from the appellant is not a contraband article.

13.2. To substantiate the aforesaid contention, he took us through the oral evidence of both the panchas and members of raiding party. According to him, at the time of taking the samples from the alleged muddamal, samples have not been properly drawn as required under the Act the rules and hence, they are not the representative samples of the muddamal seized as the samples which have been taken for analysis have not been taken after churning the whole muddamal.

14. Learned APP, Mr.I.M.pandya, placing reliance upon the impugned judgment more particularly para 16 onwards, contended that it is a well reasoned judgment and while dealing with the above referred point, trial court had dealt with the same on the basis of evidence on record and the law laid down by various Courts in that regard. The opinion given by the FSL expert is after undergoing all the scientific and chemical analysis and hence, it cannot be said to be unreliable.

15. It is clear from the evidence on record that the muddamal in question seized and sealed had reached the FSL in sealed condition. The FSL report Ex.309/310 says that the muddamal in question was of brown sugar. The report regarding the muddamal samples recovered on 25-6-1995 and sent to FSL for analysis says the following tests having conducted during the chemical examination of the substance:

i) Marquis test;
ii) Mayer test;
iii) Mackes test;
iv) Zarnik test;
v) Koppanyl test;
vi) Para-diamethyle test;
vii) Fissure motice test;
viii) Test for examining the presence of Phenolphthelin;
ix) Dequinis test; and
x) Thin layer chromatography test.

The report further says that the samples examined contained presence of morphine, dia acetyle morphine, mon

acetyle morphine, codin, acetyle codin, hebuine, papavarin, narcotine and phenobarbiton and phenolphthelin. Relying upon the aforesaid opinion, trial court came to the conclusion in para 31 of the impugned judgment as under:

> "If this opinion read with the definition of opium derivative atleast three contents are as stated in definition they are : morphine, codin and dia acetyle morphine. The conclusion also tallies with the definition of opium as given in judicial dictionary as referred to above. The substance can be said to be heroine, if we read that the item relied on in the schedule attached to the rules item 3(b) refers dia acetyle morphine as heroine. Book on pharmacology, and quite from the same relied on by the prosecution does help the prosecution. Thus the F.S.L. report (Exh.309/310) read with definition in the Act and the decision of Sumarkhan's relied on by the prosecution the substance analysed can be said to be substance banned under the Act."

In arriving at such a conclusion, the trial court considered the Mohmad Hanif's (supra) case relied upon by the learned counsel for the appellant.

15.1. We have gone through the evidence on record and it clearly appears that sufficient care has been taken by the prosecution while drawing the samples. It is case of neither the FSL expert nor the appellant that the samples drawn were insufficient for analysis. It is to be noted that muddamal was taken in duplicate each weighing 10 gms. and they are the representative samples of the whole muddamal. The muddamal is such that question of churning does not arise as it was in powder form. It is not a muddamal obtained in food adulteration case wherein muddamal would be normally seen in liquid form and if not being well stirred or churned, sample may not represent the whole muddamal. Moreover, no breach has been committed by the prosecution at the time of drawing the samples. Besides, FSL report Ex.309/310 is on the basis of physical and chemical analysis wherein expert had opined to be a contraband narcotic substance. This being the opinion of the expert on a scientific and chemical analysis, there is no reason to disbelieve the said opinion. Therefore, the finding given by the court below on this aspect is proper and legal. In view of the above, the argument advanced by the learned counsel for the appellant that the sample muddamal was not the representative of the whole muddamal and it was not taken

after churning is untenable.

16. The next contention raised by the learned counsel for the appellant was that there is violation of Sec.55 of the Act. During the course of arguments, he fairly admitted that Sec.55 is held not to be mandatory, still, however, the Court has to see whether prejudice is being caused if the provisions are violated and if so, conviction is unsustainable. It was further contended that double sealing as required under Sec.55 of the Act is not complied with nor CFSL form has been filled in on the spot. In this connection, he relied upon the cases of Valsala Vs. State of Kerala, 1993 S.C.C.(Cri.) page 1982; State of Orissa Vs. Sitanshu Shekhar Kanungo, JT 2002(8) S.C. 292; Thandiram Vs. State of Kerala, 2001 S.C.C. page 318 and Rita Karoline Kummel Vs. Customs and another, 2000 Cri.L.J. page 800. There is no Malkhana register produced to show that the goods had been given to the Malkhana In-charge and was kept without being tampered. The link evidence with regard to production from the date of seizure till the date of production in Court has not been satisfactorily proved and hence, it was contended that conviction cannot be sustained.

16.1. It was contended by him that sealing was not done as stated by the prosecution on page 57 of the judgment. The sample in the case was drawn as stated by P.W.No.24, Mr.Abhesinh Chudasma and P.W.No.26, Mr.Parmar and though there are three seals of 25-6-1995, while opening the packets on 25-6-1995, seal of 27-6-1995 was seen. It is quite relevant that a slip was found which bears the date 27-6-1995 and Crime Register No.73/1995. In this connection, he relied upon the case of Babita Vs. State, 1994 Cri.L.J. page 792 of the Bombay High Court wherein when the packet was opened for the first time in the Court, surprisingly muddamal register as also Crime Register number were found written on the label. It was held therein that the alleged manner of seizure was not established. In JT 2002 (8) S.C. page 292 seizure list contained FIR number and it was held that doubt which sprang up as regards seizure list admittedly cannot be brushed aside. Seizure list ought to have been prepared before lodgement of the FIR and as such question of mention of FIR number in the seizure list would not arise at all, but in the contextual fact indication of the case number in the seizure list has resulted in the submission of the learned advocate for the defence before the High Court and also before the Apex Court that extra noting on the seizure list cannot but be ascribed to be a manipulation in the form which is impermissible under the

law. Even the malkhana register was not produced and hence, the appeal against the acquittal was dismissed by the Apex Court.

17. Learned APP contended that provisions of Sec.55, which are certain procedural instructions for strict compliance by the officers, are not held mandatory by the Apex Court. Hence, the fact of such failure, if at all, has to be borne in mind by the Court while appreciating the evidence in the facts and circumstances of each case. The Court has to consider whether any prejudice has been caused to the accused and if provisions are not complied with, whether weight of evidence is in any manner affected because of non-compliance and the effect of such non-compliance will have a bearing on the appreciation of evidence of the official witnesses and other materials. It was further contended that the testimony of witnesses is not to be doubted or discarded merely on the ground that he happens to be an official discharging the duty in the normal circumstances.

18. As far as other contentions raised by the learned counsel for the appellant in written submissions as well as in oral arguments before this Court with regard to compliance of provisions, we say that same are not mandatory. According to us, Sec.55 of the Act are directory which describes that Officer-in-charge of Police Station shall take charge all the articles searched and seized under the Act and keep them in safe custody within the area of the Police Station and shall allow any officer who may carry such articles to the police station or may be deputed for the purpose, to affix his seal to such articles or to take samples from them and all samples so taken shall also be sealed with the seal of officer-in-charge of the police station.

18.1. It was deposed by Dy.S.P., Mr.Chudasma, in his deposition in para 4 that PSI, Nabipur Police Station, Mr.Barad, had filed the complaint on behalf of State. Along with that, he gave yadi Ex.171 to the concerned Police Station to hand over further investigation to CPI, Mr.K.R.Parmar.

18.2. It was deposed by PSI, Nabipur Police Station, Mr.Barad, that after completion of search and seizure, he went to Nabipur Police Station and complaint to that effect was registered against the accused Nos.1 and 2 being Nabipur Police Station C.R.No.II-73 of 1995 and entry Ex.122 to that effect was posted in the Station Diary at 12.15 p.m. on the same day. Thereafter, he informed his Superior Officer regarding the search and

seizure and as directed by Dy.S.P., further investigation was handed over to Shri Parmar, CPI, Ankleshwar, however, he remained with him to assist in the further investigation. It was further deposed by him that they issued receipt to the accused for having seized the muddamal from him and also informed the accused in writing regarding their arrest and obtained signatures thereon. It was further deposed by him that he was shown mark 31/11 which is the document showing seizure of muddamal from the accused. He admitted in his cross-examination that after reaching Nabipur Police Station, muddamal of the present case was handed over to Crime Writer Head, who was maintaining separate register and cupboard for such type of muddamal.

18.3. CPI, Ankleshwar Division, Mr.K.R.Parmar, who is the I.O. in this case, categorically deposed that after the arrest of the accused, receipt was issued to them upon taking their signatures. Even muddamal receipt was also given to the accused after obtaining their signatures and panchnama Ex.65 was drawn there itself. Thereafter, PSI, Nabipur Police Station, Mr.Barad, recorded the complaint in the capacity of the complainant on behalf of the State in presence of SDPO and Mr.Chudasma and it was registered. Mr.Chudasma gave in writing ordering handing over of further investigation to him. Both the accused were arrested at about 11.15 hours on 25-6-1995. He proved yadi Ex.171 written by Mr.Chudasma directing to hand over further investigation to Mr.Parmar.

18.4. Mahipatsinh Nathubawa, Head Constable, Nabipur Police Station, deposed that on 27-6-1995, Crime Writer Head gave muddamal of the present offence to him in sealed condition for handing over the same to FSL, Ahmedabad. He handed over the same to FSL, Ahmedabad, on 27-6-1995. Ex.107 which is the receipt issued by FSL for receipt of muddamal and Ex.108 which is the yadi from Nabipur Police Station to show that muddamal received by the FSL officials was duly sealed.

18.5. It transpires from the evidence on record that the muddamal in question seized on 25-6-1995 was sealed at the place of seizure itself and was handed over to Crime Writer Constable of Nabipur Police Station on the same day and it was handed over to FSL, Ahmedabad on 27-6-1995. There was no evidence on record to indicate that the muddamal packets were opened on 25-6-1995. Hence, there was no question of tampering with the said muddamal during this period. It is also clear from the certificate issued by the FSL that said muddamal reached

FSL Ahmedabad office on 27-6-1995 i.e. within 48 hours in sealed condition. Keeping in mind the office hours and distance between Nabipur Police Station and Ahmedabad, it is presumed that concerned person must have left Nabipur on 27th morning. Therefore, there was no question of tampering with the said muddamal analyzed by the FSL authorities. No submission was advanced by the learned counsel for the appellant to show as to where the muddamal remained to enable it to be tampered with by anyone especially when there is no delay in sending the muddamal to FSL. It can therefore be said that the provisions of Sec.55 of the Act were strictly followed by the prosecution and there is no non-compliance. When there is no non-compliance of the provisions, no prejudice is caused to the accused and hence, it cannot be said that conviction is unsustainable.

18.6 In Valsala Vs. State of Kerala, 1993 S.C.C.(Cri.) page 1982, it was reflected in para 4 that there was no evidence whatsoever to show with whom the seized articles were lying in safe custody till it reached the FSL office and there was no possibility of tampering. However, the case before us is quite different from that reported case and hence, the appellant would not be entitled to the benefit of said judgment.

18.7. In State of Orissa Vs. Sitanshu Shekhar Kanungo, JT 2002(8) S.C. 292, the head note reads thus:

"Sections 21, 57 with Evidence Act, 1872--Section 3--Conviction--Validity--Seizure of brown sugar--Seizure list carrying particulars of case, FIR number and name of police station--Malkhana register not produced--no evidence to show that seized articles were kept at that police station--No reason for non-production of Malkhana register. Held that acquittal by High Court was on factual score and no perversity is shown. Hence, no interference."

In that reported case, the Apex Court held mainly on the basis of fact that seizure list was carrying particulars of case, FIR number, name of the police station. In para 4 of the said judgment, it was held by the Apex Court as under:

"The seizure lists ought to have been prepared before the lodgement of the FIR and as such question of mention of the FIR no. in the

> seizure lists would not arise at all. But in the contextual facts, the indication of the case number in the seizure lists has resulted in the submission of the learned advocate for the defence before the High Court as also before this Court that this extra noting on the seizure lists cannot but be ascribed to be a manipulation in the document which is not permissible under the law."

It is established law that after search and seizure and preparing seizure list (seizure panchnama), the complaint is required to be filed and on receipt of the same by the concerned police Station, it is required to be registered. Thereafter, in all other proceedings, C.R. number, name of Police Station and other particulars will be reflected. In the case before the Apex Court, all these particulars have been reflected in the seizure list itself i.e. before registering the offence and, therefore, Apex Court came to the aforesaid conclusion keeping in mind the facts of that case. However, in the case before us, there are sufficient evidence on record to satisfy the conscience of this Court and hence, the appellant would not get any benefit out of this judgment also.

18.8. The judgment on Thandiram Vs. State of Kerala, 2001 S.C.C. page 318 is based on non-compliance of provisions of Secs.55 and 57. In the case before us, all the relevant provisions of the Act are complied with and hence, the appellant would not get any benefit of this judgment also.

18.9. It was held by the learned Single Judge of the Delhi High Court in Rita Karoline Kummel Vs. Customs and another, 2000 Cri.L.J. page 800 that safeguard provided in the Statute must be scrupulously followed. We entirely agree with the law laid down by the learned Single Judge. We have carefully considered the evidence on record and the findings arrived at by the trial Judge to that effect and we are of the opinion that all the required procedures have been strictly followed by the prosecution and possibility of tampering of the samples and false implication were out of question. Hence, this judgment also will not come in rescue of the appellant.

19. As regards double sealing, Mr.Pandya contended that second sealing is not to be done when seal is affixed on the articles which are brought and delivered to the Officer-in-charge of the Nabipur Police Station by the authorized officer seizing the said articles.

20. In the case before us, it clearly appears that the articles seized were duly sealed by the Officer seizing the articles at the place of seizure itself and thereafter, they were handed over to PSI, Nabipur Police Station, who was the officer-in-charge there and no samples were drawn at the Police Station from the articles brought there. Therefore, it was not necessary for the PSO to seal the articles again at Nabipur Police Station. On an over all view of the matter, we are satisfied that the provisions of Sec.55 of the Act are fully complied with by the prosecution and hence, the appellant is not entitled to any benefit.

21. Another contention raised by the learned counsel for the appellant was that Article 21 of the Constitution of India envisages a just, fair and reasonable procedure and hence, in case of any unjust and unreasonable procedure, the procedure as well as action on the basis of any unjust and unreasonable procedure has to be struck down.

21.1 In this connection, reliance was placed upon the case of Zahil Habibulla H.Shaikh and another Vs. State of Gujarat and others, 2004 S.C.C. page 158 popularly known as "Best Bakery case" more particularly para 34 and contended that incident was of 25-6-1995 based on the information received and search conducted earlier on 23-6-1995 and hence, said information sent to the Superior Officer was a falsified document. In the same way, panchnama drawn on 25-6-1995 was also a fabricated document.

22. As discussed at length earlier by us, the secret information was received by Mr.Chudasma on 25-6-1995 at 4.00 a.m. and after following all procedures required under the Act, they reached Sitpon Village in the bungalow of accused Nos.1 and 2 at 8.00 a.m. on the same day. There are series of evidence on record to support the say of the prosecution. Merely it was mentioned in the "Gujarat Samachar", a Gujarati vernacular daily, that investigation started on 23-6-1995 is not required to be accepted without there being any cogent and convincing evidence. In these circumstances, the argument advanced by the learned counsel for the appellant that it is not a fair trial as the document has been concocted is untenable. Minor discrepancy in the evidence of P.W.No.13 and P.W.No.19 will not come in rescue of the accused as there is a gap between recording of the statement and oral evidence of witnesses.

23. As far as the accused No.2-Aminaben, wife of Ismail Adam Mitha and the accused No.5-Ibrahim Malangminya Shaikh, who were acquitted by the trial court are concerned, appeal being Criminal Appeal No.248 of 2000 was filed by the State. However, for rest of the accused Nos.3,4 and 6, who were also acquitted by the trial court, no appeal was preferred by the State. The learned trial judge came to the conclusion as per the defence taken by the accused No.1 that the accused No.2 is permanently residing in the bungalow in question. Same has been repeated by accused No.1 in his written submissions also on the basis of depositions of P.W.Nos.2 and 3, who are servant and relative of accused Nos.1 and 2. It was held by the learned trial Judge that no inference in this regard can be drawn on the aforereferred evidence and it is for the prosecution to prove its case against each of the accused and defence sought for by the other accused cannot be used against other accused. The association of accused No.2, active or otherwise, is not established by the prosecution. It was also held that even I.O. had stated that during the investigation, no statement involving accused No.2 in this crime was recorded. Further, it was discussed as regards first raid that if the defence along with the oral evidence of P.W.Nos.2 and 3 is read together, then it can be said that the accused No.2 was present in the bungalow at the time of first raid and, therefore, prosecution can get the benefit of Secs.35 and 54 of the Act against the accused No.2. It was also held that the accused No.2 managed to escape by a thin margin and the case of the prosecution regarding the point of possession is distinguishable in the facts of the present case. It was also held that in the present case, the accused No.2 is joined as accused with her husband and as there is almost no evidence against accused No.2 for linking her with the crime, discretion was exercised in her favour. As far as Sec.25 of the Act i.e. allowing the premises to be used in the commission of offence is concerned, as no case is established against the accused No.2, Sec.25 of the Act will not be attracted qua accused No.2 and hence, she was acquitted.

24. The State, by filing the appeal against the accused No.2, contended that she was found with accused No.1 in the house at the time of search and seizure and, therefore, her role cannot be separated and taken lightly. In this connection, he took us through the evidence on record at length.

25. It is required to be noted that the accused No.2 is the wife of accused No.1. Even at the time when the

raiding party entered into the house of accused, she was in kitchen. It is also required to be noted that she is the housewife of accused No.1 and merely she was present in the house at the time of search and seizure, she cannot be involved unless it is proved by satisfactory evidence to connect her into the crime in question. The trial court rightly dealt with the same after keeping in mind the evidence on record and also the admission on the part of the prosecution that during the course of investigation, no statement involving the accused No.2 in the crime in question was recorded. Discussing further, the accused No.1 was rightly acquitted by the court below. Having regard to the discussion made hereinabove and on an over all evaluation of the evidence on record, we are of the view that there was no sufficient satisfactory evidence to connect with the accused No.2 with the crime in question. Hence, we do not intend to interfere with the finding arrived at by the learned trial Judge qua accused No.2.

26. As far as the accused No.5 is concerned, it has been dealt with by the trial court in its judgment in para 94 by holding that case of the prosecution against accused No.5 is difficult to believe as the muddamal in question was seized on the basis of panchnama under Sec.27 of the Evidence Act wherein both the panchas and weighing person did support the say of the prosecution regarding seizure of the muddamal and it was held by the trial court after discussing the oral evidence of I.O. that the accused No.5 was arrested on 12-7-1995. There is no explanation forthcoming for not raiding at accused No.5's house till it was raided on 17-7-1995. The place from where the accused No.5 was arrested is also not clear. As per the evidence of I.O., he was arrested from Musafarkhana, Near Railway station, Bharuch, at 5.00 p.m. on 16-7-1995. However, it was deposed by him that he was arrested from Karelibaug, Vadodara. It was admitted by the I.O. that no panchnama as regards this accused was drawn. It was discussed by him that case of the accused No.5 could be considered from another aspect and taking into consideration the way in which alleged search and seizure were made by the investigating agency, the accused No.5 was acquitted by the learned trial Judge and hence, appeal has been filed by the State against this accused also.

27. Learned APP, Mr.Pandya, took us through the statements of various witnesses regarding the raid so as to show the involvement of the accused No.5 in the crime in question. Taking us through the evidence of both the panchas, I.O., police officers, weighing person,

photographer, witnesses from hotel and trustee of the mosque in whose property the accused No.5 was having one shop on a rental basis, it was contended that during the course of third raid, brown sugar was searched and seized from the tailoring shop of accused No.5 situated at Vadodara by way of panchnama drawn under Sec.27 of the Indian Evidence Act.

28. However, on going through the discussion made by the trial Judge, we are of the opinion that panchas did not support the say of the prosecution. Not only that, even weighingman, Mr.Yusuf Banglawala, also did not support. Moreover, other witnesses including the Manager and other persons from the concerned hotel situated at Vadodara also did not support. On evaluation of evidence of I.O. qua the accused No.5, the date on which and the place from where he was arrested was not established at all. On the one hand, it is the prosecution case that he was arrested on 12-7-1995 and on the other hand, I.O. says that he was arrested on 16-7-1995. There is discrepancy regarding the place of arrest also. At the first instance, it is the say of I.O. that the accused No.5 was arrested at Musafarkhana, near Railway Station, Bharuch at 5.00 p.m. on 16-7-1995 whereas I.O. himself had deposed that accused No.5 was arrested from Karelibaug, Vadodara on 12-7-1995. There is no arrest memo on record either. It was also admitted by the I.O. that no arrest panchnama of this accused was drawn.

29. We have gone through the evidence of Police Constable, who was accompanying the I.O. in the third raid and who opened the shop named "Smart Tailor" situated at Vadodara belonging to the accused No.5. It was deposed by him that when they reached there, the accused No.5 took out key of the shop from his pocket and handed over to him for opening the same. If the accused No.5 was arrested on 12-7-1995 or on 16-7-1995, then it can be presumed that he was moving along with the key from very beginning. If he was arrested, then there will be arrest panchnama reflecting the articles recovered from him. However, nothing of the sort was drawn as clear from the deposition of I.O. In absence of arrest panchnama and cogent evidence regarding the date and place of his arrest, it creates doubt in the mind of the Court. Hence, we also share the same view that as prosecution failed to prove the same, court below had rightly acquitted the accused No.5 also.

30. Having regard to the aforesaid discussion, we are of the opinion that judgment and order dated 4-2-2000 passed by the learned District and Sessions Judge,

Bharuch, in Sessions Case No.145 of 1995 do not require any interference. Hence, both these criminal appeals are required to be rejected.

31. Both the criminal appeals are accordingly rejected.

(R.P.DHOLAKIA,J.)

(SHARAD D.DAVE,J.)

radhan/